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No. 85-1066

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES G. MARTIN, ET AL., APPELLANTS

v.

TERRY L. HAITH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

1. Whether Section 5 of the Voting Rights Act of 1965 requires changes in voting procedures for the election of judges in covered jurisdictions to be precleared by either the Attorney General or the United States District Court for the District of Columbia.

2. Whether any of the state laws in issue in this case, which introduced changes in the procedures for election of judges, should have been deemed "submitted" for preclearance because they were reenacted in later statutes that were precleared.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellee is a black citizen of North Carolina. He instituted this action to enjoin the election of superior court judges pursuant to state laws that had been passed between 1965 and 1983 but had not been precleared under Section 5 of the Voting Rights Act of 1965.[1] A statutory

[1] Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, bars certain covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without obtaining preclearance from either the Attorney General of the United States or the United States District Court for the District of Columbia. A jurisdiction seeking preclearance must demonstrate that the voting change in question "does not have the purpose and will not have the effect" of abridging the right to vote on account of race. It is undisputed that 40 counties

three-judge court was convened pursuant to 28 U.S.C. 2284 (see *Allen* v. *State Board of Elections,* 393 U.S. 544, 563 (1969)) (J.S. App. A2). On cross-motions for summary judgment, the court held that the state statutes were subject to Section 5, and enjoined their further implementation until they were precleared.[2]

a. As of November 1, 1964, only two of the state's 30 superior court districts had two judges, the rest having only one each. In the two two-seat districts, the candidates ran at large without specifying the seat for which they were running. The first change was enacted in 1965. Chapter 262 of the Session Laws (S.L.) of 1965 (1965 N.C. Sess. Laws 297) required the judges in multiseat districts to specify the seat for which they were running. After that, many additional districts were made into multiseat districts. Indeed, the other five state statutes at issue here all added judges in various districts. Those statutes are S.L. Chapter 997 (1967 N.C. Sess. Laws 1440), S.L. Chapters 1119, 1130 (1977 N.C. Sess. Laws 1405, 1414), S.L. Chapter 1238 (1977 N.C. Sess. Laws 181 (1978)),[3] and S.L. Chapter 1109 (July 1, 1984) (J.S. App. A3-A4). This last Act, together with S.L. Chapter 997 (1967) and S.L. Chapter 1119 (1977), gave most of the judges in newly created seats terms that were staggered from those of the original judges (*i.e.,* it gave them numbered posts so that candidates would run for a single, specified position).

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in North Carolina are subject to Section 5 of the Voting Rights Act (J.S. App. A4), and that the covered counties are affected by the state statutes in issue (*ibid.*).

[2] After the district court decided this case, North Carolina submitted the disputed state statutes to the Attorney General. We have lodged with the Clerk and served on the parties copies of the Assistant Attorney General's letters of April 11, 1986, and May 23, 1986, interposing objection to some of the changes and precleaving others.

[3] S.L. Chapters 1130 and 1238 added judges by splitting three judicial districts into six, thereby changing the boundaries of existing districts (J.S. App. A3-A4).

b. The appellants made three arguments below with respect to the challenged statutes:

(i) they argued that they were not required to seek preclearance of the laws in dispute, because Section 5 of the Voting Rights Act does not apply to changes in the law relating to the election of judges (J.S. App. A5);

(ii) they maintained that two of the challenged statutes, S.L. Chapter 262 (1965) and S.L. Chapter 997 (1967), had in fact been precleared because they were reenacted in subsequent years, included in laws that were submitted, and "precleared" by letters sent in April 1971 by Assistant Attorneys General Jerris Leonard and David L. Norman (J.S. App. A6-A7; see letters at J.S. App. A47-A49); and

(iii) they maintained that the above-mentioned April 1971 letter from David L. Norman, Acting Assistant Attorney General, contained language that misled them into believing that it was not necessary to submit changes in law relating to the election of judges (J.S. App. A7).

c. The facts on which claims "ii" and "iii" above are based are as follows:

On February 18, 1971, the State sent two packages of laws to the Assistant Attorney General for Civil Rights for preclearance. The first package consisted of 13 acts passed in 1967 (J.S. App. A18-A19); the second contained 14 acts passed in 1969 (J.S. App. A26).

The 1967 package contained two statutes having to do with the state judiciary. Chapter 775 (1967 N.C. Sess. Laws 775) (J.S. App. A21) recodified and amended the state's election code. In so doing, it reenacted the numbered-post provision contained in S.L. Chapter 262 (1965), which had never been submitted (see J.S. App. A16 para. 11). The reenactment did not effect any "change" in the relevant election law. The other statute was Chapter 1049 (1967 N.C. Sess. Laws 1516),(J.S. App. A21-A25). That statute had one provision pertaining to election of solicitors; the rest had to do with the power and duty of solicitors, and was generally unrelated to elections.

The 1969 package (J.S. App. A26) included, among other things, S.L. Chapter 1190 (1969 N.C. Sess. Laws 1369) (J.S. App. A28-A46). That Act contained a lengthy reenactment of the schedule of superior court judges for the entire state, incorporating the changes made by S.L. Chapter 997 (1967), which had never been submitted (see J.S. App. A16 para. 11). S.L. Chapter 1190 also included many pages of provisions that have nothing to do with election law.

The submissions of 1967 and 1969 were answered in reverse order. On April 20, 1971, Assistant Attorney General Jerris Leonard responded to the 1969 package, preclearing all but one of the 1969 acts (J.S. App. A47). On April 23, 1971, Acting Assistant Attorney General David L. Norman responded to the submission of 1967 laws (J.S. App. A48-A49). In that letter, in addition to preclearing most of the acts submitted, he noted that the State had submitted "several statutes, * * * such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act."

2. The district court held that Section 5 contains no exception for election of judges. Noting this Court's decisions in *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978), and *Allen* v. *State Board of Elections, supra,* the district court held that Section 5 requires preclearance of *all* changes, however minor, in the election law of a covered jurisdiction (J.S. App. A5-A6).

In addition, the district court held that under this Court's ruling in *McCain* v. *Lybrand,* 465 U.S. 236 (1984), and the Attorney General's Procedures for the Administration of Section 5, 28 C.F.R. 51.25, the two laws allegedly precleared had not been properly submitted for preclearance. It is not enough, under the Procedures, that the same language might appear in *later* statutes that were in fact precleared. In transmitting the later reenactments,

the court said, the State did not call any attention to the parts that constituted reenactments of post-November 1964, unprecleared laws (J.S. App. A6).

Finally, the district court held that it did not matter if the State claimed to have been misled by Acting Assistant Attorney General Norman, whose 1971 letter was read by the State to suggest that electoral laws pertaining to the judiciary did not need to be submitted. Under the Voting Rights Act, electoral changes affecting covered jurisdictions must be precleared; the district court held that it lacked authority to relieve any jurisdiction of that obligation even if the authorities had in fact been misled by Mr. Norman's letter (J.S. App. A7-A8).

DISCUSSION

This case presents no novel or difficult legal question. Accordingly, there is no reason for plenary review, and this Court should summarily affirm the judgment of the three-judge district court. The plain words of the Voting Rights Act of 1965 state that, where judges are elected, voting discrimination is prohibited. In jurisdictions covered by Section 5, changes in the law affecting the election of judges must be precleared. There is no authority to the contrary.

The district court was clearly correct, moreover, in holding that even if Mr. Norman's April 1971 letter had been misleading, this would not estop the present Attorney General from seeking compliance with Section 5; nor, obviously, could it serve to divest the plaintiff, a black voter, of his right to seek and obtain an injunction against implementation of nonprecleared voting changes.

Finally, appellants' claim that the Assistant Attorney General precleared two of the statutes in issue, by preclearing their reenactment, is foreclosed by this Court's decision in *McCain* v. *Lybrand,* 465 U.S. 236 (1984).

1. a. As the district court held (J.S. App. A5-A6), the plain language of the statute is sufficient to dispose of appellants' contention that the Voting Rights Act does not apply to elections of judges. The Voting Rights Act, on its face, applies to "voting" for public office without exception.[4] Section 5, 42 U.S.C. 1973c, applies to "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" (emphasis added). "Voting" is defined in Section 14(c)(1), 42 U.S.C. 1973*l*(c)(1), to include

> all action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, registration, listing pursuant to this [Act], or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast *with respect to candidates for public or party office and propositions for which votes are received in an election.* [Emphasis added.]

Where judges are elected rather than appointed, they are "candidates for public * * * office," and it seems beyond any doubt that the strictures of the Voting Rights Act apply. There is no legislative history to the contrary.[5]

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[4] Section 2(a) of the Voting Rights Act, 42 U.S.C. 1973(a), provides, for example, that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2).

[5] For the most part, appellants' only reliance on the legislative history is for its alleged silence with respect to the judiciary (J.S. 12-14). As we show below, the legislative history is not so silent with respect to judges as appellants suggest; and, if it were, that silence would hardly support the creation of an exception from a statute

Claims of intentional racial discrimination in the election of judges have been held cognizable under the Fifteenth Amendment (*Voter Information Project* v. *City of Baton Rouge,* 612 F.2d 208 (5th Cir. 1980)), and it follows that they are cognizable under Section 2 of the Voting Rights Act.[6] Yet, according to appellants, statutes that abridge the right of blacks to vote for judges need not be precleared under Section 5.[7] Congress enacted no such loophole.

b. Appellants contend that because the principle of "one-person-one-vote" has been held not to apply to

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whose plain terms encompass *all* elections for public office. Appellants' one attempt to construct an affirmative argument from the legislative history (J.S. 7) is strained indeed. Appellants contend that a witness in the 1975 extension hearings explained that the phrase "abridging the right to vote" in Section 5 meant diluting the vote, and they proceed to argue that the concept of vote dilution has no meaning with respect to the judiciary. Aside from the tenuous logic of this argument, the short answer is that the witness said only that the concept of abridgement "includes a dilution," not that the two concepts were identical. See *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. Pt. 1, at 636 (1975).

[6] In *City of Mobile* v. *Bolden,* 446 U.S. 55, 60-61 (1980) (opinion of Stewart, J.), a plurality of this Court held that Section 2, before its 1982 amendment, "was intended to have an effect no different from that of the Fifteenth Amendment itself," and no Justice took issue with this statement. Apparently aware that the reliance on the Fifteenth Amendment in *Voter Information Project* implies that judicial elections are subject to the Voting Rights Act, appellants baldly assert that the case should have been decided under the Fourteenth Amendment alone (J.S. 14). Given the text and purposes of the two Amendments (see generally *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960)), this assertion is unsupportable.

[7] Appellants do not, and could not (see *NAACP* v. *Hampton County Election Comm'n,* No. 83-1015 (Feb. 27, 1985), slip op. 13-14), argue that the need to preclear a statute under Section 5 depends on

judicial elections (J.S. 8), judicial election changes are not subject to Section 5. This contention misses the point. "One-person-one-vote" is a constitutional doctrine independent of racial discrimination.[8] As such, this doctrine is not a concern of the Voting Rights Act. Changes in apportionment in covered jurisdictions must be submitted under Section 5, but the Attorney General examines those changes for racially discriminatory purpose or effect. The Attorney General could not interpose an objection under Section 5 for the reason alone that election districts were malapportioned, in the absence of racial purpose or effect. On the other hand, if blacks within any given judicial district do not have an equal opportunity to elect candidates of their choice to the bench, that may well violate Section 2—or a change having this impact in a covered jurisdiction may be denied Section 5 preclearance.[9]

c. Appellants' contention that application of Section 5 to judicial elections would constitute an enlargement of coverage, not contemplated by the Justice Department or Congress (J.S. 5-14), is factually incorrect. The Attorney

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whether it in fact abridges the right to vote. If appellants need not preclear their statutes relating to judicial elections, then no statute relating to judicial elections, no matter how pernicious, would have to be precleared.

[8] "[T]he various 'one man one vote' cases involving Judges make clear that they do *not* involve claims of race discrimination as such." *Voter Information Project,* 612 F.2d at 211 (footnote omitted).

[9] It is not necessary to the resolution of this case for the Court to consider whether changes in jurisdictional amounts or redistribution of trial and appellate jurisdiction are changes affecting voting (see J.S. 14). That is not what the statutes at issue do.

General has, from the start, treated judicial election laws as subject to preclearance, and has so informed Congress.

For example, on June 27, 1968, the Attorney General precleared amendments to the constitution of the State of Georgia that provided for superior court judges and solicitors to be elected within the circuits they served instead of statewide (Files S1523-S1524).[10] And in 1971, the Attorney General precleared a whole series of changes in Virginia's election law with respect to judges (Files V5084, V5518, and V5529). In 1973, the Attorney General registered "no objection" to a South Carolina submission relating, among other things, to election terms and duties of various clerks, coroners, sheriffs, and solicitors (File V5503). Similarly, in 1974, North Carolina itself submitted for preclearance Chapters 855 and 838 of the Session Laws of 1973 (1973 N.C. Sess. Laws 19 and 10 (1974)), which added judges to the state's superior court and district court system, and received a "no objection" letter in response (Files V6439-V6440).

The Attorney General has objected to certain changes in judicial election laws as well. On December 26, 1972, the Attorney General objected to an Alabama change from elected to appointed justices of the peace. This objection was brought to the attention of Congress when the Voting Rights Act extension of 1975 was under consideration.[11] It is also mentioned in one of the reports that Congress reviewed and appellants cite (J.A. 13).[12] On February 20, 1976, the Attorney General objected to an Alabama statute that combined two counties in a judicial district. This objection was brought to the attention of Congress

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[10] The United States has lodged with the Clerk and served on the parties those excerpts from its Section 5 files referred to in this brief.

[11] See *Extension of the Voting Rights Act: Hearing on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. Pt. 1, at 183 (1975) (Exhibit 5 to testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division).

[12] U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After* 171 (1975). This report also notes the effect of the Voting

when the Voting Rights Act Extension of 1982 was under consideration.[13] On February 7, 1980, the Attorney General objected to a Louisiana statute and a Baton Rouge ordinance requiring certain judges to be elected at large by a majority vote. Congress was so advised.[14]

Thus, appellants are quite wrong in their assertion (J.S. 12, 15) that the Department of Justice has not construed the Voting Rights Act to apply to judicial elections.[15] They are also quite wrong to assert that Congress has never been advised that Section 5 "might in any way restrict the ability of a State to modify its judicial system" (J.S. 14). The number of objections to judicial elections may have been relatively small, but that factor has no bearing on the coverage of the Act. This Court, relying on the 1982 House Report, has noted that Congress expressly eschewed limiting the reach of Section 5 to those voting changes that have most frequently been the subject of objections. *NAACP* v. *Hampton County Election Commission,* No. 85-1015 (Feb. 27, 1985), slip op. 11 n.27. Section 5 of the Voting Rights Act covers judicial elections.

Rights Act on the number of black elected law enforcement officials, including sheriffs, judges, justices of the peace, constables, and magistrates. *Id.* at 141, 287, 377.

[13] *Extension of the Voting Rights Act: Hearings Before the Sub-Comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. Pt. 3, at 2247 (1982) [hereinafter cited as *1982 Hearings*] (Attachment 6 to Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, to Rep. Don. Edwards).

[14] *1982 Hearings 2260.*

[15] In fact, appellants themselves placed in the record an affidavit from a former Assistant Attorney General in charge of the Civil Rights Division that observes that a North Carolina statute dealing with judicial elections "would[,] today, have been required to be submitted and precleared under Section 5 of the Voting Rights Act" (J.S. App. A13 para. 4).

2. The letter sent by David L. Norman to the State of North Carolina in April 1971 should not have misled the State of North Carolina, and it appears that it did not. It said expressly that the statutes that did not need to be submitted were those that did *not* relate to voting and elections. See page 4, *supra*. Among the materials Mr. Norman reviewed were many statutory provisions that did not deal with voting practices or procedures. There was therefore little reason to "misunderstand" and conclude that acts *in fact* making changes in court-related "voting practices or procedures" need not be submitted in the future. That there was at least one identifiable *later* submission from North Carolina containing changes in the election laws for judges suggests that the State officials were not misled.

In any event, a misunderstanding on the part of a state official could not have estopped the Attorney General from enforcing Section 5 where it applied (see J.S. 18-20). Even when a government official gives a member of the public incorrect information, this Court has been extremely reluctant to conclude that this excuses the allegedly misled party from complying with the law. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). As this Court noted in *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 (1984) (footnote omitted):

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.[16]

In this case, a fortiori, the relevant State official's claim to have been misled by Mr. Norman's letter cannot serve to "estop" third parties (*i.e.*, black citizens) from vin-

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[16] The facts in the present case would not give rise to an estoppel even against a private party, much less the government. In *Heckler* v.

dicating their rights under the Voting Rights Act. The district court was clearly correct in concluding that it had no authority to deny an injunction because of the State's claim that it was unsure of its obligations in the past.

3. Appellants argue that the Court should carve out an exception to the rule in *McCain* v. *Lybrand,* 465 U.S. 236 (1984), and treat two of the disputed acts as having been "precleared" because they were incorporated in later enactments that were, themselves, cleared. Apparently, the basis for an exception would be that the State did not intentionally circumvent the requirements of Section 5 (J.S. 20-21). But it is irrelevant, under Section 5, why a voting change was not submitted.

This Court explained in *Allen* v. *State Board of Elections,* 393 U.S. 544, 571 (1969), that the Attorney General cannot be deemed to have precleared a change in election laws unless it was explicitly and unambiguously submitted to him.[17] The reason should be obvious. If the submission does not appear to *change* existing law, the Attorney General (or his delegate) is going to assume that he need not review it.

For example, if the State submits a reenacted schedule of superior court judge positions in each judicial district, without comment, there is no way for the Attorney General to know that, hiding in that list, there is an unprecleared act from two years before. In fact, if he looks at the state code, he will reach the conclusion that the list

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Community Health Services, 467 U.S. at 59, this Court outlined the traditional elements as a "definite misrepresentation," in a circumstance in which the speaker has reason to know that the other will rely on it, and detrimental reliance. There was no such misrepresentation here, and there is no "detriment" to submitting legislation for preclearance later rather than sooner.

[17] The rule was incorporated in the first set of procedures governing Section 5 submissions (36 Fed. Reg. 18186, 18188 (1971)).

represents no "change" in any electoral law, for the change occurred two years before.

The district court was correct in holding that none of the statutes in issue had ever been properly submitted.

CONCLUSION

The judgment below should be summarily affirmed.
Respectfully submitted.

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